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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM PYMM, EDWARD PYMM, JR., PYMM THERMOMETER
CORPORATION, AND PAK GLASS MACHINERY CORPORATION,

Petitioners,

—vs.—

STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, preempts state criminal prosecution, pursuant to laws of general application, of crimes committed against workers in the workplace?

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WILLIAM PYMM, EDWARD PYMM, JR., PYMM THERMOME-
TER CORPORATION, AND PAK GLASS MACHINERY COR-
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Petitioners,

—VS.—

STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the New York Court of Appeals opinion in this case. That opinion is reported at 76 N.Y.2d 511, 561 N.Y.S.2d 687, 563 N.E.2d 1 (1990).

STATEMENT OF FACTS

From the early 1970's, petitioners Pymm Thermometer Corporation (PTC), Pak-Glass Machinery Corporation (Pak-Glass), and William and Edward Pymm, Jr. were repeatedly warned by state and federal agencies about the extreme

dangers of mercury and the precautions necessary to protect workers from mercury poisoning. Nevertheless, petitioners continued for fifteen years to expose workers at their thermometer manufacturing plant to excessively high concentrations of mercury vapor in the air, risking damage to the workers' brains, kidneys, and other vital organs and body systems. Opinion at 3-5.¹

Petitioners' operation was housed in a two-story building in Brooklyn, New York. The individual defendants were officers of PTC and were responsible for daily management and supervision of the plant's operations. PTC manufactured thermometers for clinical use on the second floor of the plant. Pak-Glass made, serviced, and repaired the machinery used at PTC and was located on the first floor of the same building, at ground level. *Id.* at 2-3. Between 1981 and 1985, eighty to a hundred people worked in the plant.

Contrary to petitioners' contentions, the conditions on petitioners' main manufacturing floor were not in compliance with regulations of the Occupational Safety and Health Administration (OSHA) from January, 1981 to October, 1985. During that period, OSHA inspected the plant at least four times and issued numerous citations for violations of OSHA standards and regulations in 1981 and 1985. In 1981, petitioners were cited for exposing their workers on the manufacturing floor to mercury vapor concentrations averaging double the permissible OSHA level. They were also warned about the inadequacy of ventilation, the absence of personal protective equipment, and the need to warn and train workers regarding the dangers of mercury. *Id.* at 5-6. For over four years, petitioners did little or nothing to cure the violations or to comply with OSHA's suggestions. Thus, during an OSHA inspection ending in March, 1985, OSHA cited petitioners for poor housekeeping, exposing workers to mer-

1 The opinion of the court below has been reproduced by petitioners as the first document in the Appendix to their Petition. Citations to "Opinion at ____" are references to the opinion as reproduced in the Appendix.

cury vapor in excess of the permissible OSHA level, failing to furnish feasible engineering controls, and permitting a worker to eat in the work area. *Id.*

Already aware of the dangerous conditions on their main manufacturing floor, petitioners created and maintained even worse conditions in a cellar mercury-reclamation operation, starting in April, 1983. In order to salvage some of the valuable mercury it had been wasting in its above-ground manufacturing process, PTC constructed a crushing machine which ground up broken and defective thermometers, spewing mercury-laden dust into the face of the machine operator. The machine was housed in a windowless, underventilated cellar, where petitioners stored boxes leaking mercury from the broken and faulty thermometers. *Id.* at 6-7.

Into this extremely hazardous operation, petitioners sent several workers, including Vidal Rodriguez. When Mr. Rodriguez began working for petitioners in 1981, he was a strong and healthy man of forty-five. R. 2097-98, 2688, 2693.* After about two years of working as a cleanup and handy man on the manufacturing floor, where he was exposed to high concentrations of mercury vapors from the action of cleaning solvents and from sweeping up mercury droplets, he began suffering the ill effects of mercury. His knees ached, he had difficulty sleeping, he became irritable, he suffered headaches and dizziness, and he needed a cane to walk the one and a half blocks from home to work. R. 2104-6, 2683, 2686-88. After working in the cellar, Mr. Rodriguez's injuries worsened considerably. The damage to his brain had become irreparable. Opinion at 7-8.

The severity of Mr. Rodriguez's injury was the result of his daily exposure, for approximately six hours a day, over an eleven month period, to the especially high concentrations of mercury vapor in the cellar, after he had been previously overexposed while working on the main factory floor. While other workers were exposed to similar dangers, the evidence

* Citations to R. _____ are references to the minutes of trial, as originally paginated, which are part of the record in the Court of Appeals.

showed that they were not seriously injured because none of them spent as much time in the cellar as Mr. Rodriguez; none were exposed in the same manner as Mr. Rodriguez.

When Mr. Rodriguez asked petitioners about any possible dangers of working with mercury, they lied to him, telling him mercury was not dangerous to people. R. 2106-7. They provided no training for any of their workers and refused to supply Mr. Rodriguez and others with protective clothing and other safety equipment.

In June, 1984, Mr. Rodriguez injured his arm at work. While being treated for his injury, he learned from the physician who treated him that many of the symptoms the petitioners had been attributing to his alleged old age were, instead, the results of mercury poisoning from exposure in petitioners' plant. R. 2691, 2877, 2894, 2898. When Mr. Rodriguez returned to work after a two week course of hospital treatment for mercury poisoning and asked petitioners to fill out his workers' compensation form, which included a claim for mercury poisoning, petitioners fired him on the spot. R. 2692-94, 2892-94.

While Mr. Rodriguez and other workers labored in the cellar mercury reclamation operation (from approximately April, 1983 to October, 1985), at least two OSHA inspections took place. Petitioners hid the existence of this operation from OSHA and from other governmental agencies which came to their plant, by lying about areas in which mercury was used, by omitting the cellar from purportedly complete tours of all the work areas at PTC, and by closing the operation temporarily during inspections. Consequently, OSHA did not learn about the cellar operation or have an opportunity to inspect it or take measurements to determine air mercury vapor concentrations while workers were there. Opinion at 6-7. In fact, OSHA learned of the existence of the reclamation operation by happenstance. In October, 1985, Mr. Rodriguez found the inspectors on the street during their lunch break and told them about the cellar. R. 255-58, 1837-39.

When the inspectors then asked petitioners about the cellar, petitioners lied about its existence, tried to prevent OSHA inspectors from measuring the mercury vapor levels in the cellar, and performed a massive cleanup to conceal the conditions under which the workers had labored. R. 265-68, 270-71, 314-15. Expert testimony, including that of a Professor of Environmental Engineering at Harvard University, established that the mercury vapor breathed by Vidal Rodriguez and other workers was approximately fifty times the OSHA limit. R. 497, 554.

After Mr. Rodriguez's illness was discovered, the New York City Department of Health examined other workers in petitioners' plant. Contrary to petitioners' apparent claim to this Court (Petition at 22), tests revealed that over half of the workers in the plant in October, 1984 had urine mercury levels considered hazardous by OSHA, including about twenty percent who had levels which mandated their immediate removal from exposure. R. 1115-17. Mr. Rodriguez had mercury urine levels three times as high as those OSHA considered hazardous. R. 1233A-7, 1301.

In addition, expert medical evidence offered at trial established that Mr. Rodriguez suffered permanent damage to his central and peripheral nervous systems. Opinion at 7-8. Among the experts who testified at trial were doctors who conducted objective neurophysiological tests on Mr. Rodriguez at Boston University Hospital in April, 1986. What most impressed the team that examined Mr. Rodriguez were the "holes" in his brain that they saw in its magnetic resonance image. R. 2620, 2638. Every medical expert who examined or treated Mr. Rodriguez agreed that there was no explanation for Mr. Rodriguez's illness other than mercury vapor poisoning due to exposure at petitioners' plant. Opinion at 7-8.

On the basis of these and other facts, the jury convicted petitioners of Conspiracy in the Fifth Degree (New York Penal Law § 105.05 (1) and Falsifying Business Records in the First Degree (New York Penal Law § 175.10) for conspir-

ing to conceal the existence of the cellar operation and thereby causing OSHA to make inaccurate reports; Assault in the First Degree (New York Penal Law § 120.10(4)) for the infliction of serious physical injury to Mr. Rodriguez in the course and furtherance of the felony of Falsifying Business Records in the First Degree (New York Penal Law § 175.10); Assault in the Second Degree (New York Penal Law § 120.05(4)) for recklessly inflicting serious physical injury upon Mr. Rodriguez with a dangerous instrument, namely, mercury; and Reckless Endangerment in the Second Degree (New York Penal Law § 120.20) for creating a substantial risk of serious physical injury to all of the workers in the plant.

The trial court set aside the verdict on the ground that the Occupational Safety and Health Act of 1970 (OSH Act) preempted New York State from prosecuting petitioners for violations of New York State Penal Law. The New York State Supreme Court, Appellate Division, Second Department, reversed the trial court's decision and reinstated the verdict. *People v. Pymm*, 151 A.D.2d 133, 546 N.Y.S.2d 871 (2d Dep't 1989).

The New York Court of Appeals unanimously affirmed the order of the Appellate Division, holding that the OSH Act does not preempt the State of New York from providing New York workers the same protections under criminal law as other citizens, and that the state may prosecute a corporation and its officers for crimes against their workers. *People v. Pymm*, 76 N.Y.2d 511, 561 N.Y.S.2d 687, 563 N.E.2d 1 (1990). The court also rejected petitioners' contention, repeated in their petition to this Court, that it was a "physical impossibility" to comply with New York State and federal law in this area. "The [OSH] Act does not require an employer to engage in conduct that is prohibited by the State of New York, nor is the reverse true." Opinion at 36. In so ruling, the court below noted that the highest courts of Illinois and Michigan had also held that state criminal law is not preempted by the OSH Act. *Id.* at 37 (citing *People v. Chicago Magnet Wire Corp.*, 126 Ill. 2d 356, 128 Ill. Dec. 517,

534 N.E.2d 962, *cert. denied*, ____ U.S. ____, 110 S.Ct. 52 (1989); *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989)).

REASONS WHY THE PETITION SHOULD BE DENIED

The petition for a writ of certiorari should be denied because the New York Court of Appeals correctly applied well-understood principles relating to the Supremacy Clause of the United States Constitution and the power of Congress to preempt state law. Moreover, this record does not present the issue petitioners posit. Petitioners have presented this case to the Court as involving a state criminal prosecution for conduct and conditions that complied with the OSH Act standards and requirements. They insist that the prosecution's case rested on speculation and that the evidence of violations of OSHA standards and injury to their employee was insufficient and subjective. These assertions distort both the record below and the basis for the decision of the Court of Appeals.

Here petitioners' conduct not only egregiously violated OSHA regulations, but also deviated dramatically from any reasonable standard of care owed by members of society to each other. As a result, according to expert and other objective evidence offered at trial, petitioners caused serious brain damage to one employee and gravely endangered other workers. It was on the basis of this record that the Court of Appeals held that this prosecution, pursuant to state criminal laws of general application, was not preempted by the OSH Act. This decision is supported by the language and legislative history of the OSH Act and by the decisions of this Court upon which the Court of Appeals relied. It is also consistent with the decisions of the highest courts of the other states that have considered this issue.

1. The ruling of the New York Court of Appeals is consistent with the rulings of this Court regarding preemption.

Congressional intent is "the ultimate touchstone" in determining preemption. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). The purpose of Congress in enacting the OSH Act was to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). The Act was the response to what Congress described as a "grim current scene" in which industrial accidents and illnesses due to occupational toxic exposures were resulting in ever increasing human misery and economic loss. S. Rep. No. 91-1218, 91st Cong. 2nd Sess. (1970), *reprinted in Legislative History of the Occupational Safety and Health Act of 1970*, Committee Print, 92nd Cong. 1st Sess., June 1971, at 142 (hereinafter, *Legislative History*).

In order to accomplish its purpose of assuring a safe and healthful workplace, Congress established a regulatory program, the primary focus of which was to prevent injuries in advance, rather than to penalize employers for past conduct or to compensate injured workers. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980); *Hegedus*, 432 Mich. at 604, 443 N.W. 2d at 129; *see also* Note, *Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535, 537 (1987). The regulatory program is based both on the General Duty Clause, which requires that employers provide employees a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm", Section 5, 29 U.S.C. § 654, and detailed standards promulgated by the Secretary of Labor, pursuant to Section 6 of the OSH Act, 29 U.S.C. § 655. The OSH Act was "to assure minimum—but not necessarily uniform—occupational health and safety standards." *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 59 (2d Cir. 1988).

The fact that states are encouraged in the first section of the act to develop their own occupational safety and

health standards subject only to the condition in § 18(c)(2) that they be "at least as effective" as the federal standards, indicates that Congress was not primarily concerned with uniformity but rather intended the federal act to provide a kind of "floor" of protection to employees.

Hegedus, 432 Mich. at 622, 443 N.W.2d at 138. Furthermore, the regulatory program was expressly intended to co-exist with state common law and statutes relating to "injuries, diseases or death of employees arising out of, or in the course of employment." 29 U.S.C. § 653(b)(4).²

Although the Act does contain limited penalties, Congress did not intend to supplant the states in the use of their criminal powers. To the contrary, by enacting the OSH Act, Congress created a complex scheme which reserves substantial authority for the states outside of the regulatory sphere, including the authority to apply their penal laws where they have been violated.

In holding that New York State can exercise its police power to prosecute crimes against workers under the Penal Law, the Court of Appeals correctly applied and relied upon the rulings of this Court governing preemption. As the Court of Appeals preliminarily noted,

"[w]here . . . the field that Congress is said to have preempted has been traditionally occupied by the states . . . 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "

2 Section 4(b)(4) provides:

Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment.

29 U.S.C. § 653 (b)(4).

Opinion at 17-18 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Such clear and manifest purpose to preempt is entirely absent from the OSH Act. That absence is fatal to petitioners' claim in light of the states' predominant historical interest in regulating health and safety matters. *Hillsborough Co. v. Automated Medical Labs, Inc.*, 471 U.S. 707, 719 (1985).

a. The OSH Act does not expressly preempt New York State Penal Law.

Congress can preempt state law by stating such an intention in explicit language. *Jones v. Rath Packing Co.*, 430 U.S. at 525. The court below correctly rejected petitioners' contention that Section 18(a) of the OSH Act, 29 U.S.C. § 667(a), expressly preempts New York State penal law. Section 18(a) provides:

Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under state law over any occupational safety and health issue with respect to which no standard is in effect under section 655 of this title.

29 U.S.C. § 667(a).

The court concluded that Congress only intended to preempt states from imposing their own occupational safety and health standards, and that a prosecution under New York's penal law of general application does not constitute the imposition of such standards.³ Opinion at 20. Relying on this Court's opinion in *Whirlpool Corp. v. Marshall*, 445 U.S. at 12, the court noted that OSHA standards are "prophylactic measures that are intended to prevent workplace accidents from ever occurring," while state criminal law is triggered

3 A standard is defined in the OSH Act as:

a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

29 U.S.C. § 652(8).

after the fact by the commission of acts which "the society as a whole deems unacceptable, wherever they may occur." Opinion at 21. Criminal law imposes penalties "that reflect society's condemnation of behavior in violation of generally accepted norms," and serves "to deter conduct that society has labelled intolerable and morally repugnant, and in this way protect every citizen of the state." Opinion, at 21-22. See also *Chicago Magnet Wire*, 126 Ill. 2d at 366, 534 N.W.2d at 966 (1989); *Hegedus*, 432 Mich. at 610, 443 N.W.2d at 132; Note, *Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. at 543.

In addition, the OSH Act contains a savings clause which preserves state common law and statutory rights, duties and liabilities of employers and employees with respect to injury, diseases and death of workers. Section 4(b)(4), 29 U.S.C. § 653(b)(4). As the court below recognized, the savings clause, when viewed in the context of the broad presumption against preemption, demonstrates that Congress did not intend Section 18 of the Act to preempt state penal laws. Opinion at 22-23. See also *Hegedus*, 432 Mich. at 167, 443 N.W.2d at 135.

b. The OSH Act does not impliedly preempt New York State penal law.

Even when federal preemption is not explicit, it may be implied where there is "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it" because Congress intended to dominate the field. *Pacific Gas and Electric Co. v. State Energy Resource Conservation and Dev. Comm'n.*, 461 U.S. 190, 203 (1983) (quoting *Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153 (1982)); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Here, however, as the court below properly found, the federal statutory scheme was "intended to foster continuing state oversight over the workplace. . . ." Opinion at 25.

i. The OSH Act does not occupy the field of workplace safety and health.

As the Court of Appeals concluded, by enacting the OSH Act, Congress did not intend the federal government to occupy the field of workplace safety and health. Rather, Congress intended the states to remain deeply involved in ensuring the health of workers. As the court observed, "[t]he Act explicitly encourages states to 'assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws' (29 U.S.C. § 651(b)(11))." Opinion at 25. *See also Hegedus*, 432 Mich. at 619, 443 N.W. 2d at 136; *Chicago Magnet Wire*, 126 Ill. 2d at 367-8, 534 N.W. 2d at 966-7. In addition, Section 18 of the OSH Act specifically permits the states to assume responsibility for enforcement of occupational safety and health standards by adopting a "state plan", and to adopt standards which are more stringent than the federal standards. 29 U.S.C. § 667(b).

The court below also relied on the legislative history of the OSH Act which reaffirms that Congress intended that the states would remain involved in insuring workplace safety and health and that the states could supplement federal minimum safety standards. Opinion at 33-34 (citing Statement of Rep. Karth, 116 Cong. Rec. 38,392 (Nov. 23, 1970); Statement of Sen. Williams, 116 Cong. Rec. 37,325 (Nov. 16, 1970); Statement of Sen. Saxbe, 116 Cong. Rec. 36,521 (Oct. 13, 1970)); *see also* Statement of Rep. Gaydos, *reprinted in* Legislative History at p. 1035.

While it is true Congress intended to create a comprehensive nationwide approach, *Legislative History* at 144, that approach was to provide ". . . a floor of federal standards which the States can build upon." Statement of Sen. Saxbe, *Legislative History* at 297. Furthermore, while Congress may have expressed concern that conscientious employers might be at a competitive disadvantage, Petition at 4, the federal regulatory "floor" was created not out of a concern about the burdens on employers from multiple states laws, but rather to

ensure that those states that were vigorously protecting the health and safety of their workers would not be disadvantaged. *United Steelworkers of America v. Auchter*, 763 F.2d 728, 734 (3rd Cir. 1985). The court therefore correctly rejected petitioners' contention that Congress intended to create uniform safety standards. Petition at 30-31.

Silkwood v. Kerr-McGee, 464 U.S. 238 (1984), relied upon by the court below, makes clear that state penal law is not preempted even when enforcement of that law would touch upon conduct that is already regulated by federal law and might have an indirect regulatory impact. In *Silkwood*, this Court upheld an award of punitive damages pursuant to state law despite its indirect regulatory impact on conduct over which the Nuclear Regulatory Commission had exclusive regulatory authority. 464 U.S. at 256. As the Illinois Supreme Court stated in *Chicago Magnet Wire*:

There is little if any difference in the regulatory effect of punitive damages in tort and criminal penalties under the criminal law. (See Restatement (Second) of Torts § 908, comment b (1970)). We see no reason, therefore, why what the Court declared in *Silkwood* should not be applied to the preemptive effect of OSHA. Also, if Congress, in OSHA, explicitly declared it was willing to accept the incidental regulation imposed by compensatory damages awards under State tort law, it cannot plausibly be argued that it also intended to preempt State criminal law because of its incidental regulatory effect on workplace safety.

126 Ill.2d at 370-71, 534 N.E.2d at 968.

Finally, the Court of Appeals properly rejected petitioners' contentions that permitting the application of state penal law would conflict with the penalty structure established by Congress in the OSH Act. The Act relies primarily on civil, and has only limited criminal penalties.⁴ This is not surprising in

⁴ The OSH Act contains criminal penalties only for giving advance notice of inspections, making false statements, or for willful violations

light of the prophylactic nature of the Act. *Whirlpool Corp. v. Marshall*, 445 U.S. at 12. Thus the court below concluded that the very fact that “. . . the penalties are so skeletal . . . argues against their being considered preemptive of state criminal law.” Opinion at 31; *see also Hegedus*, 432 Mich. at 624, 443 N.W.2d at 138.

ii. New York State penal law does not conflict with the purpose of the OSH Act.

Even where state law is not expressly or impliedly preempted, it may be preempted when it actually conflicts with federal law and it is impossible to comply with both state and federal law, or where it stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Pacific Gas and Elec.*, 461 U.S. at 204; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-3 (1963).

Since Congress did not intend to mandate complete uniformity in the field of occupational safety and health, the court properly rejected petitioners' contention that the application of state criminal law conflicts with the purpose of the OSH Act. Opinion at 33. Rather, as the court found, the use of state penal law is not merely consistent with, but in furtherance of “. . . the Act's self-proclaimed purpose—ensuring ‘safe and healthful working conditions’ for American workers” *Id.* at 27, and neither federal nor state law requires an employer to engage in any conduct which is prohibited by the law of the other government. *Id.* at 36.

Petitioners claim that if the opinion below is permitted to stand, “. . . employers (such as petitioners) who comply with the OSH Act standards [can] become subject to local prosecution.” Petition at 34. The Court of Appeals, however, found that rather than being in compliance with OSH Act standards, the petitioners had an on-going problem of

causing the death of a worker. 29 U.S.C. § 666(e)-(g). There is no criminal penalty for violations (willful or otherwise) which cause serious physical injury or illness or even the complete incapacity of a worker.

mercury contamination at their factory which posed a risk of health to their employees and violated OSHA standards and regulations. Opinion at 3, 5-6. As the Court of Appeals and the Appellate Division both found, petitioners' claim that they could be prosecuted under State law despite compliance with federal law is "a hollow one." Opinion at 36.

2. The ruling of the New York Court of Appeals is in accord with the rulings of the highest courts of all other states which have considered the question.

The question of whether the OSH Act preempts the application of state penal law to crimes which occur in the workplace has been considered by the highest courts of New York, Illinois, and Michigan. The Supreme Courts of Illinois and Michigan, like the New York Court of Appeals, have held that state penal law is not preempted. *Chicago Magnet Wire*, 126 Ill.2d 356, 534 N.E.2d 962; *Hegedus*, 432 Mich. 598, 443 N.W.2d 127. The Wisconsin Court of Appeals also held that state law is not preempted and the Wisconsin Supreme Court declined to review the matter. *State ex rel Cornellier v. Black*, 144 Wisc.2d 745, 425 N.W.2d 21 (Ct.App. 1988), *pet. for review denied*, 145 Wis.2d 916, 430 N.W.2d 351 (Wisc. 1988). The only appellate court which has held that state law is preempted is an intermediate appellate court in Texas. *Sabine Consolidated, Inc. v. State of Texas*, 756 S.W. 2d 865 (Tex. App. 1988). That decision was made without the benefit of the decisions of the highest courts of New York, Illinois and Michigan.⁵ Thus, there are no conflicts among the states which warrant review by this Court.

⁵ *Colorado v. Kelran Const. Inc.*, 13 OSHC 1898 (D. Ct. Colo. 1988), cited by petitioners, was also decided before the decisions of the three high courts and was never appealed. *Thornock v. State*, 229 Mont. 67, 745 P.2d 324 (Mont. 1987), also cited by petitioners, did not involve the application of state criminal law, but rather the question of whether Montana had a duty under state law to inspect a workplace where the plaintiff was injured or whether that duty was superseded by federal law. That case is therefore irrelevant to the question of the preemption of state criminal law.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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